

# August 2020 LED - CJTCWebsite



## Covering cases published in August 2020

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The materials contained in this course are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.

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# LED Course Overview

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## OVERVIEW

Each month's *Law Enforcement Digest* covers court rulings issued by the three divisions of the Washington Courts of Appeal, the Washington State Supreme Court, the federal Ninth Circuit Court of Appeals, and the United States Supreme Court.

Cases are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges.

The materials contained in this course are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.

## WA LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- [Legal Update for WA Law Enforcement](#) authored by retired Assistant Attorney General, John Wasberg
- [Caselaw Update](#) authored by WA Association of Prosecuting Attorneys' Senior Staff Attorney, Pam Loginsky

## QUESTIONS?

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# STATE v. AARON MARK HARRIER

## 52544-5-II

Court of Appeals Division Two

Filed August 18, 2020

### Facts Summary

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Synchronoss provides cloud-based storage for Verizon Wireless customers. The Defendant, **Aaron Mark Harrier**, had a Verizon account and subscribed to Synchronoss cloud storage. Synchronoss conducted a search of its subscriber cloud database using the “hashing” technique. **As a result of the search, Synchronoss discovered six digital images associated with Harrier’s [1]Verizon account that had identical hash values to those identified in prior law enforcement investigations as child pornography.** The images were reported to the National Center for Missing and Exploited Children (NCMEC) CyberTipline as required by law. NCMEC did not open or view the sex images, but did forward the CyberTip, including the digital files of the images, to the Vancouver Police Department for investigation.

**The assigned detective opened and viewed the six image files to confirm that the images were child pornography.** Based on his training and experience, he determined that the six images consisted of nude and partially nude prepubescent female children engaged in lewd and lascivious display of their genitalia. The detective then obtained search warrants based on the descriptions of the images and served them on Verizon and Synchronoss.

The search warrants directed Synchronoss to provide “all information” held by Synchronoss associated with the suspect telephone number connected to the images. Verizon provided information that confirmed that Harrier was the subscriber/account holder for the suspect telephone number. Synchronoss provided the detective with a thumb drive containing account data associated with the suspect telephone number.

**The account data consisted of files containing family pictures of Harrier, including a photo of a wallet displaying Harrier's Washington Driver's License, and additional images depicting minors engaged in sexually explicit conduct.** In reviewing the additional images, at least 10 depicted nude or partially nude prepubescent children engaged in sexually explicit activities with adults. The detective then obtained a search warrant for Harrier's residence based on a detailed description of the images found. Harrier's cell phone was seized during the search and it was determined to be the same phone associated with the Verizon account and the Synchronoss files that were the basis of the initial search warrants. Harrier was interviewed and admitted to law enforcement that he had viewed images of minors engaged in sexually explicit conduct and that he had used his cell phone for this purpose.

**Harrier was charged with two counts of first degree possession of depictions of a minor engaged in sexually explicit conduct and three counts of second degree possession of depictions of a minor engaged in sexually explicit conduct.** The Defendant was found guilty by the trial court and appealed his convictions. On appeal, Harrier argued that the detective, by opening and viewing images sent by NCMEC, exceeded the scope of Synchronoss' lawful private search of the images and that the opening and viewing of the images was unlawful. Harrier based his argument on the Fourth Amendment to the United States Constitution.

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*[1] In 2008, Congress passed the PROTECT Our Children Act, which mandates that service providers report suspected child pornography in the content that their customers surf and store, assuming they have the ability to utilize image-matching technology. Synchronoss uses the "hashing" technique to check images and videos for the presence of children known to be the victims of pornographers by scanning for the unique identifier of known illegal files and matching the unique identifier to the images/videos searched and stored by customers.*

*Possible "hits" in customer content is then reported to Verizon who then associates the hits with a specific customer account and passes the hits to the NCMEC Cyber Tipline. The Cyber Tipline then notifies local law enforcement in the area where the specific customer account is located.*

# Training Takeaway

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## Privacy Interests and Warrantless Searches

**Warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.**

The Fourth Amendment protects a person's subjective and reasonable expectation of privacy and article I, section 7 provides that "[n]o person shall be disturbed in this private affairs, or \_\_\_\_\_ his home invaded, without authority of law." However, if a private affair is not disturbed, then there is no violation of article I, section 7 and a defendant has the burden of providing a disturbance of his private affairs under the Washington Constitution. Under Washington case law, when a private party hands evidence over to the police, there is no privacy interest in that evidence. Furthermore, there is no privacy interest in contraband. Child pornography is contraband.

**In the case at hand, it was undisputed that Synchronoss, a private party, conducted the initial lawful search using the "hashing" technique.** The hash value of images from Harrier's cell phone was identical to the hash value of images previously identified as child pornography by law enforcement. It is also undisputed that Synchronoss then made a legally required CyberTip to NCMEC who forwarded the information and tip to law enforcement to investigate.

Because a private party conducted the search and the images were contraband, Harrier did not have a privacy interest in them. Therefore, the police's opening and viewing of the images from a private party were not unlawful and Harrier argument failed. Harrier's convictions were affirmed.

# STATE v. KRISTOPHER CHARLES MARTIN

78958-9-I

Court of Appeals, Division One

Filed August 31, 2020

## Facts Summary

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An officer responded to a 911 call from a Starbucks employee, requesting assistance with the removal of a sleeping person inside the store. Upon arrival, the officer observed Kristopher Martin sleeping in a chair. The officer obtained verification from the employee that Martin was the person at issue. The responding officer noted that Martin was wearing multiple jackets that had pockets. The officer attempted to wake Martin, first by raising his voice and then by squeezing and shaking Martin's shoulder. Martin remained unresponsive and then performed a "light sternum rub," using his knuckles to rub Martin's sternum. Martin would briefly gain consciousness during this process but would then lose consciousness before the officer could communicate with Martin.

The officer believed that Martin was under the influence of drugs and was concerned about using a "hard sternum rub" and getting a violent reaction from Martin, noting that there were a number of customers and employees nearby. The officer then noticed the end of a metal utensil sticking out of Martin's pocket. The officer worried that the metal utensil could have been a knife or another metal item sharpened into a weapon. The officer also had concerns about the presence of needles. Without feeling the outside of the pocket, the officer removed the utensil, which turned out to be a cook spoon with burn marks on the bottom and a dark brown residue on the inside. At that point, the officer determined that he had probable cause to arrest Martin for possession of drug paraphernalia and continued searching the still unconscious Martin.

In his search of Martin's person, the officer found methamphetamine, heroin, cocaine, and other drug paraphernalia. After removing the drugs from Martin, the officer conducted a hard sternum rub. Once Martin woke up, the officer told Martin that he was under arrest, handcuffed him, and brought him to an aid car. Martin was transported to the hospital due to the difficulty the officer had in waking him up.

**Martin later moved to suppress all evidence collected as a result of an unlawful detention and search.** The trial court denied the motion to suppress, concluding that “[c]ommunity caretaking and Terry authorized the officer to take necessary precautions to protect himself and others from a potentially dangerous situation". The trial court further concluded that the officer was authorized to pat Martin down for potential weapons. The trial court found Martin guilty and he appealed.



# Training Takeaway

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## Search and Seizure

The Washington Constitution commands that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The United States Constitution also protects people from unreasonable searches and seizures and absent an applicable exception such as a Terry Stop, warrantless searches and seizures are per se unreasonable and violate these provisions. The State bears a heavy burden to prove by clear and convincing evidence that a warrantless search falls within one of those exceptions.

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### *Terry* Stop Exception

On appeal, Martin contended that the trial court erred in finding the search permissible under Terry because 1) there was no reasonable suspicion that Martin was engaged in criminal activity, 2) there were not specific and articulable reasons to believe Martin was armed and dangerous, and 3) the officer exceeded the lawful scope of the frisk.

In a Terry stop, officers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct. While Terry does not authorize a search for evidence of a crime, officers are allowed to make a brief, non-intrusive search for weapons if, after a lawful Terry stop, “a reasonable safety concern exists to justify the protective frisk for weapons” so long as the search goes no further than necessary for protective purposes. In making that determination, courts consider the totality of the circumstances, including the officer’s subjective belief. A protective frisk does not violate a defendant’s rights when 1) the initial stop is legitimate, 2) a reasonable safety concern exists to justify a protective frisk for weapons, and 3) the scope of the frisk is limited to the protective purpose.



**A reasonable safety concern exists, and a protective frisk for weapons is justified,** when an officer can point to “specific and articulable facts” that create an objectively reasonable belief that a suspect is “armed and presently dangerous.” The failure of any of those three components makes the frisk unlawful and the evidence seized inadmissible. The officer does not need to be absolutely certain that the individual is armed, but rather whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety or the safety of others was in danger.

**In this case at hand, the search failed to meet the requirements under Terry.** Starbucks is open to the public and there was no evidence that Martin was trespassing or that the officer was investigating a trespass complaint. There was further no evidence that supports the officer’s claim that Martin’s sleeping created a reasonable safety concern. There was no evidence to support the conclusion that Martin would react violently once awakened.

Additionally, the officer did not ask any of the patrons or employees to move away before using the hard sternum rub to wake Martin after searching him while he was unconscious. Furthermore, even if the officer had been conducting a criminal investigation for trespass or another crime, the search exceeded the scope of a frisk under Terry.

**In a frisk under Terry, an officer may conduct a limited pat-down of the outer clothing of a person in an attempt to discover weapons that could cause harm.** An officer may not slide, squeeze, or in any other manner, manipulate the object to ascertain its incriminating nature. Such manipulation of the object will exceed the scope of a Terry frisk. Here, the officer did not pat-down the outside of Martin’s pocket where the item was protruding, but merely removed it, believing it to be a knife or other metal utensil that had been sharpened into a weapon. Had the officer felt the outside of Martin’s pocket, the officer would have learned that the object was a spoon and not a sharp object. Therefore, the officer’s removal of the spoon without a pat-down exceeded the scope of a Terry frisk.

## **Community Caretaking Exception**

**Martin next contended that the community caretaking exception to the warrant requirement was also not applicable.** In order for the community caretaking exception to apply, a court must first be satisfied that the officer’s actions were “totally divorced” from the detection and investigation of criminal activity. The threshold issue for the court is whether the community caretaking exception was used as a pretext for a criminal investigation before applying the community caretaking exception test.

Once the court is satisfied that officers did not use the exception as a pretext, the court must next determine if the warrantless search was reasonable. Where an encounter involves a routine check on health and safety, its reasonableness depends upon a balancing of a citizen's privacy interest in freedom from police intrusion against the public's interest in having police perform a community caretaking function.

**An emergency aid function under community caretaking involves circumstances of greater urgency and searches resulting in greater intrusion than a routine check on health and safety.** Accordingly, courts apply additional factors to determine whether a warrantless search falls within the emergency aid function of the community caretaking exception.

Courts utilize a three-part emergency aid test in making determinations about warrantless searches under more urgent circumstances that involve the danger of death or physical harm, but there must be a present emergency for the emergency aid function test to apply. The exception, therefore, applies when 1) the officer subjectively believed that an emergency existed requiring that s/he provide immediate assistance to protect or preserve life or property, or to prevent serious injury, 2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and 3) there was a reasonable basis to associate the need for assistance with the place searched.

**Here, there was insufficient evidence to find that the officer was conducting a routine check on health and safety or rendering emergency aid.** The officer was dispatched to Starbucks for an individual who was sleeping that employees wanted to leave, not to assist with an unresponsive customer or a customer in need of emergency aid. The officer did not express any need to perform lifesaving measures and neither the officer nor any of the customers or employees expressed concern that Martin was in danger of death or physical harm. The officer again did not ask anyone to back away from the area before performing the hard sternum rub so the officer did not subjectively believe an emergency existed and a reasonable person in the same situation would not believe that there was a need for assistance.

Furthermore, even if the community caretaking exception applied to the search, a simple pat-down on the outside of Martin's pocket would have alleviated any concern that the metal object was a sharp object or a weapon.

**Removing the spoon violated Martin's right to be free from unreasonable searches and seizures and Martin's conviction was vacated.**